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**MINUTES  
SEPTEMBER 15, 2006**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:15 a.m., on Friday, September 15, 2006, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Don Marble, Heidi Kaiser, Gayle Skunkcap, Kim Lacey, Bill Rossbach & Robin Shropshire

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Tom Livers, Deputy Director; John North, Chief Legal Counsel; David Rusoff, Legal; Jane Amdahl, Legal; John Arrigo, Administrator, Enforcement Division; Art Compton, Administrator, Planning, Prevention & Assistance Division (PPAD); Bob Bukantis, PPAD; Christian Levine, PPAD; Jeff Blend, PPAD; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Don Vidrine, Air Resources Management Bureau (ARMB), PCD; Charles Homer, PCD; Debbie Skibicki, ARMB, PCD; David Klemp, ARMB, PCD; Jan Brown, ARMB, PCD; Dan Walsh, ARMB, PCD; Tina Engel, ARMB, PCD.

Interested Persons Present (Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.): Bob Green; Charles Bocock, CCE; Bud Clinch, Montana Coal Council; Anne Hedges, Montana Environmental Information Center; Jeff Chaffee, Bison Engineering; John Tietz, BKBH; Jim Parker, PPL Montana; Gordon Criswell, PPL Montana; Leo Berry, GWP; Gary Forrester, Montana Dakota Utilities; Brandon Wittman, Yellowstone Valley Electric; Dave Kelsey, Southern Montana Electric and Yellowstone Valley Electric; M.S. Kakuk, MAB, MBIA & WETA; Hilary Ransdell, CCE and self; Joe Lierow, Bison Engineering; Bonnie Turner, Westmoreland Coal; Candace Payne, Southern Montana Electric; Keith Bales; Bill Pascoe, Great Northern; Steve Wade, BKBH; Shawn ---, AWL; Tom Torm, Northern Plains; Stuart Lewin, CCE; Greg Lind, Senate District 50.

I.A.1 Review and approve June 2, 2006, meeting minutes.

Chairman Russell called for a motion to approve the June 2 meeting minutes. Ms. Shropshire so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

I.A.2 Review and approve June 21, 2006, teleconference minutes.

Chairman Russell called for a motion to approve the June 22 meeting minutes. Ms. Shropshire so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

I.A.3 Review and approve July 21, 2006, meeting minutes.

Chairman Russell called for a motion to approve the July 21 meeting minutes. Ms. Shropshire so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II.A.1.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.b In the matter of violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.c In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.d In the matter of the request for hearing of Jay Gasvoda, d/b/a Gasvoda Construction, BER 2005-17 OC, regarding the Notice of Violation and Statement of Proposed Penalty.

Ms. Orr said the parties in this case are discussing settlement and that deliberation of the summary judgment motion had been delayed.

II.A.1.e In the matter of the request for hearing of James McDonald, d/b/a McDonald Ready Mix, regarding violations of the Opencut Mining Act, BER 2006-05 OC.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.f In the matter of the request for hearing of Bruce Wood, d/b/a Big Sky Ready Mix,

regarding a notice of violations of the Opencut Mining Act, BER 2006-06 OC.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.g In the matter of the request for hearing of Tom and Noel Gorton, d/b/a Creston Top Soil, regarding a notice of violations of the Opencut Mining Act, BER 2006-07 OC.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.h In the matter of the request for hearing of Kountry Korner Enterprises, d/b/a Kountry Korner Café, regarding violations of the Montana Public Water Supply Laws, BER 2006-09 PWS.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.i In the matter of the Montana Environmental Information Center's appeal of Air Quality Permit No. 3182-01, issued for the Roundup Power Project, BER 2005-21 AQ.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.j In the matter of the appeal by Willow Creek Sewer District regarding violations of the Water Quality Act, BER 2006-13 WQ.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.k In the matter of the request for hearing of Michael Golembeski regarding the permit process of the Paveco Gravel Pit, BER 2006-14 OC.

Ms. Orr said there is a pending motion to dismiss and that she would rule on it soon.

II.A.1.l In the matter of the request for hearing of the Teton County Airport Commission regarding violations of the Montana Underground Storage Tank Act at the Choteau Airport, BER 2006-15 UST.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.A.1.m In the matter of the request for hearing of U.S. Customs and Border Protection regarding a notice of violation concerning the Del Bonita Border Station, BER 2006-16 PWS.

Ms. Orr had nothing to add beyond the summary given in the agenda.

II.B.1 Cases in Litigation -- In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., BER 2003-14 HW.

Ms. Orr said the Board's decision in this case had been appealed and is in Glacier

- County.
- III.C.2 In the matter of final action regarding the request for hearing of Michael and Kimberly Thomas, concerning DEQ's approval of the Blahnik Construction, Inc.'s JCSL North Gravel Pit.
- Ms. Orr said the appellant withdrew their objection and that the Department filed a Motion to Dismiss, which she granted.
- Chairman Russell called for a motion to authorize him to sign the order for dismissal. Ms. Kaiser MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.D.1 In the matter of the new request for hearing of Robert Klein, Clancy School District No. 1, regarding violations of the Montana Public Water Supply Laws, BER 2006-17 PWS.
- Chairman Russell called for a motion to appoint Ms. Orr permanent hearing examiner for this case. Mr. Marble so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.D.2 In the matter of the new notice of appeal and request for hearing by the Citizens Awareness Network, Women's Voices for the Earth, and the Clark Fork Coalition regarding DEQ's approval of the Thompson River Co-Gen, LLC, Air Quality Permit No. 3175-04, BER 2006-18 AQ.
- Chairman Russell called for a motion to appoint Ms. Orr permanent hearing examiner for this case. Mr. Marble so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- II.C.1 In the matter of a briefing regarding the Aluminum Smelter Air Pollution Control Maintenance Rule.
- Mr. Walsh provided an update on the status of the Columbia Falls Aluminum maintenance rule, including current activities being conducted in accordance with the rule, and said the EPA had recently disapproved the rule. He said Columbia Falls Aluminum is now potentially subject to substantial enforcement fines from EPA, even though they are complying with the state rule, and that the Department is revisiting portions of the rule that EPA has taken issue with.
- Mr. Wright commented in support of the rule.
- III.C.1 In the matter of final action regarding the request for hearing of Thomas M. Thomas, Pointe of View Ranch, pertaining to a notice of violations of the Water Quality Act, BER 2006-11 WQ.
- Chairman Russell recused himself and asked Mr. Marble to act as Chairman for

this item.

Mr. Marble called for a motion to authorize him to sign the order dismissing this contested case. Ms. Lacey so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous vote.

- II.C.2 In the matter of a briefing regarding the Board's Zortman tour, scheduled for September 29, 2006.

Mr. Livers said he had been working with Mr. Stiffarm and that September 29 had been discussed for the tour, although specific events had not been discussed. He said he would keep the Board informed as plans develop.

- III.A.2 In the matter of final action regarding the amendment of ARM 17.8.504, 17.8.505 and 17.8.514, pertaining to the annual adjustment of air quality application, operation and open burning fees.

Mr. Homer said a public hearing was held August 8 on the annual fee update and no members of the public were present. He said one written comment was received in support of the fees.

Chairman Russell called for a motion to adopt the rule, and to accept the presiding officer's report, the 521 and 311 analyses, and the responses to comments. Mr. Marble so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.A.1 In the matter of final action regarding the amendment of ARM 17.8.740 and 17.8.767 and the adoption of New Rules I and II pertaining to control of mercury emissions from facilities that combust coal to generate electricity for sale, and the adoption of the cap and trade provisions of the federal Clean Air Mercury Rule (CAMR).

Mr. Livers discussed the control portion of the rules, which included the proposed .9 emission limit and possible alternative emission limits, or AELs. He discussed the proposed requirements for 2010 and 2018. He said the rule would also require a mercury-specific BACT analysis every 10 years for all electrical generating units.

Mr. Livers said the Department is recommending participation in EPA's trading program, but with a different allocation formula that would not allow unbridled trading or for plants to buy their way out of compliance. He explained that the CAMR default allocation formula would allocate 97 percent of the mercury credits to existing facilities, but that the proposed rule would recalculate the allocations each time a new facility comes on line. He provided further details regarding the proposed rules.

Mr. Livers, Mr. Homer and Mr. Klemp responded to questions from the Board regarding differences between lignite and subbituminous facilities, AELs, emission limits, the application and permitting processes, BACT analyses, and reporting

requirements.

Specific portions of the rules were discussed. Board members conveyed a desire to have a type of progress and enforcement plan in place. Discussion took place regarding BACT and soft landings in 2018.

The Board directed that the .9 limit should remain in place explicitly, and that between the .9 and the BACT review, whichever is more stringent should apply, with a possible AEL soft landing of approximately 1.1, or 20 percent above the .9 limit for subbituminous plants.

Discussion regarding emission limits for lignite facilities took place. The Board directed that the Department review the data for lignite facilities and return with a limit that these facilities can comply with now.

Mr. Livers discussed the mercury allocations portion of the rules, referring to it as the market mechanisms that help provide incentives for efficiency.

Chairman Russell called for public comment.

Mr. Kelsey offered concerns regarding the 10-year BACT reviews and the cap and trade portion of the rules, but said he liked the soft landing approach.

Mr. Chaffee concurred with Mr. Kelsey's concerns.

Mr. Pascoe said the ability to buy emission allowances, the soft landing and differentiating between lignite and subbituminous plants were the important pieces of the final rule to Great Northern.

Mr. Criswell said Colstrip stands by the testimony it submitted to the record. He asked that the rule allow flexibility in implementing the control technology as it develops and that it provide flexibility and discretion to the Department in implementing it.

Mr. Wade, on behalf of Bill Connors of Rocky Mountain Power, requested that the rule acknowledge the settlement agreement it entered into with MEIC and the Department, which was approved by the Board, with regard to the proposed rules.

Ms. Hedges submitted a letter from Jonathon Windyboy, which encouraged the Board to set strong limits and to not encourage the use of lignite coal. She said the soft landings and AELs are very generous and elaborated on her statement. She also discouraged the Board from encouraging the use of lignite coal.

Ms. Phillips concurred with concerns shared by Ms. Hedges and offered more details regarding those concerns. She spoke against the cap and trade in any form.

Ms. Ransdell and Mr. Bullcock also commented briefly.

Mr. Rossbach MOVED that: 1) the Department include specific standards in the rules for AELs, such as the kind of information required with AEL applications, how the information will be evaluated and what is to be considered; 2) the rule contain specific information regarding time tables, measurable progress and how the progress is measured; and 3) the rule include language as to the sanctions or fines, or other types of enforcement the Department will use if a plant is not making the progress required pursuant to the AEL. Ms. Shropshire SECONDED the motion. Discussion regarding the motion took place. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Marble MOVED that the Board ask the Department to provide more information on the concept of a rolling 12-month average with regard to plants first starting up. Ms. Kaiser SECONDED the motion. Further discussion took place and the motion CARRIED with a unanimous VOTE.

Discussion took place regarding the "mercury control practices" language. Chairman Russell called for a motion to use "strategy" in place of "practices" and to change "mercury emission limit control technology, boiler technology, or practices" to "strategy, including but not limited to." Mr. Rossbach so MOVED. Mr. Skunkcap SECONDED the motion. Discussion continued and the motion CARRIED with a unanimous VOTE.

Mr. Rossbach MOVED that the Department consider developing some form of an AEL at 2018, following the same principles, and consistent with the 2011/2012 period. Ms. Shropshire SECONDED the motion. Discussion took place regarding the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Mr. Rossbach MOVED that the Department confer with MEIC and Rocky Mountain Power concerning whether there is need for appropriate language in the rules regarding the settlement. Ms. Lacey SECONDED the motion. Discussion regarding the matter continued. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

After discussion about the 2018 soft landing motion, Chairman Russell called for a motion for the Department to include a lignite soft landing number proposal for 2018. Ms. Lacey so MOVED. Ms. Kaiser SECONDED the motion. Chairman Russell called for a VOTE and the motion CARRIED unanimously.

Discussion took place regarding the possible need for lignite facilities to have a soft landing prior to 2018 for financing purposes. Ms. Shropshire MOVED that all facilities be required to buy credits beyond the .9 limit, as needed, between 2010 and 2018. Mr. Marble SECONDED the motion. Further discussion took place. The

motion FAILED with 4 VOTES opposed and 1 member abstaining.

Discussion took place regarding severability if the CAMR rule dies. Ms. Shropshire MOVED that a severability paragraph be included. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Ms. Shropshire MOVED that the language "consistent with BACT" in Rule I, Part 7, be changed to make it whatever BACT is. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Homer explained an error regarding timing. Mr. Rossbach MOVED to have Mr. Homer correct the error. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Ms. Shropshire MOVED that if there are extra allocations, banking not be allowed. The motion DIED with NO SECOND.

Discussion took place regarding the pending teleconference to approve the rules and timing for getting the draft to the Board. The Board decided that the teleconference would take place Wednesday, October 11, at Noon.

III.D.3 In the matter of the new request for hearing of On Your Way, Inc., regarding violations of the Montana Underground Storage Tank Act, BER 2006-19 UST.

Chairman Russell called for a motion to appoint Ms. Orr permanent hearing examiner for this case. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.1 In the matter of the DEQ's request to initiate rulemaking to amend ARM 17.30.617 and 17.30.638 pertaining to the Outstanding Resource Water (ORW) designation of a portion of the Gallatin River.

Mr. Rossbach MOVED that the Board initiate the rulemaking and that the Board preside over it. Ms. Shropshire SECONDED the motion. Further discussion took place and Mr. Rossbach made a nested motion that the hearing be held in Gallatin Gateway and that it be limited to one day. Mr. Marble SECONDED the motion. Discussion continued and the nested motion CARRIED with a unanimous VOTE.

Chairman Russell called for public comment on. No one responded.

Chairman Russell called for a VOTE, and the original motion CARRIED unanimously.

After further discussion, the Board decided on October 25, 2006, as a hearing date for this rulemaking.




IV. General Public Comment

Chairman Russell called for general public comment. There was no response.

V. Adjournment

Chairman Russell called for a motion to adjourn. Mr. Skunkcap so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE and the meeting adjourned at 4:16 p.m.

Board of Environmental Review September 15, 2005, minutes approved:

  
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JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

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DATE